HJ. SALLEH JAFARUDDIN

v.

DATUK CELESTINE UJANG & ORS.

SUPREME COURT, KUCHING
GEORGE SEAH SCJ
MOHD. AZMI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 307 OF 1985]
26 APRIL 1986

ADMINISTRATIVE LAW: *Writ of prohibition - Quasi-judicial or administrative - Excess of jurisdiction - Statutory bodies - Acting in an investigative capacity.*

CONSTITUTIONAL LAW: *Jurisdiction Article 72(1) of the Federal Constitution - Section 21 of the 8th Schedule of the Federal Constitution - Article 24(1) of the State of Sarawak's Constitution.*

CIVIL PROCEDURE: *Application for leave - Order 53 r. 1(3) of the Rules of the High Court 1980.*

The appellant (a member of the Dewan Undangan Negeri Sarawak) asked for leave to apply for an order to prohibit the respondents as members of the Committee of Privileges of the Dewan Undangan Negeri Sarawak "from investigating or adjudicating upon a charge of an alleged breach of privilege of the Dewan Undangan Negeri Sarawak" allegedly committed by the appellant on 16 May 1985. The alleged breach of privilege was the uttering of certain statements while making a speech at the sitting of the Dewan on that date. The appellant applied to the Chairman of the Committee (the 1st respondent) for the disqualification of the 2nd, 4th and 7th respondents on the ground of likelihood of bias against him and that he be permitted legal representation. The 1st respondent replied that the application of the appellant was not approved. The appellant then applied to the High Court at Kuching for leave to issue an order of prohibition against the respondents directing and restraining them from proceeding with the enquiry scheduled on 23 September 1985. The learned Judge refused leave and the appellant then appealed to the Supreme Court.

Held:

[1] (per George Seah SCJ): The writ of prohibition is directed to Courts of inferior jurisdiction, statutory bodies exercising such legal jurisdiction when they were brought into existence by Acts of parliament and to any person or body of persons conferred with such jurisdiction by any enactment passed by a State legislature. See *Ridge v. Baldwin* [1964] AC 40.

[2] (by George Seah SCJ and Mohd. Azmi SCJ): The Committee of Privileges of the Dewan Undangan Negeri Sarawak do not fall within any of the categories described in (1) above. The function of the Committee is to consider all matters which shall be referred to it concerning the privileges and powers of the Dewan and to report the same from time to time to the Dewan. The committee are an investigating body of the Dewan and have no decision making power. Therefore the proceedings of the said Committee when acting as an investigating body are not amenable to an order of prohibition.

[3] (by Wan Hamzah SCJ): The grounds on which the appellant relied on for his application for leave touch on the question of the validity of the proceedings to be taken by the Committee. The Committee was a Committee nominated under O. 69(5) of the Standing Orders

of the Dewan. Taking into account Article 24(1) of the Constitution of the State of Sarawak, to question the validity of the proceedings of the Committee is to question the validity of the proceedings of the Dewan and to do so in the Court is forbidden under Article 72(1) of the Federal Constitution.

[Appeal dismissed. Each party to pay own costs of the appeal.]

Cases also referred to:
Clifford v. O'Sullivan [1921] 2 AC 570
London Corporation v. Cox LR 2 HL 239/254
Mackonochie v. Lord Penzance [1880-81] 6 App. Cas. 424/443
The Queen v. Local Government Board [1882-83] 10 QBD 309
R v. Electricity Commissioners [1924] 1 KB 171
O'Reilly v. Mackman [1983] 2 AC 239
Ridge v. Baldwin [1964] AC 40
Stockdale v. Hansard 112 ER 1112

Legislation referred to:
Constitution of the State of Sarawak, art. 24(1)
Federal Constitution, arts. 8, 21, 72(1), (2), 160(2)
Rules of the High Court 1980, O. 53 r. 1(3), O. 52 r. 1

Other sources referred to:
Practice of the Crown Office, Short & Mellor, 2nd Edn., p. 252
''Prohibition'', Bacon's Abr, Vol. vi, p. 564
''Prohibition'', Lomyn's Digest, Vol. vii, p. 139

For the appellant - G. Sri Ram (Mr. Chew Pok Oi with him); M/s. Abdul Rahman, Chan, Jugah, Wan Ullok & Co.
For the respondents - Abdul Hamid Yusof, Deputy State Attorney-General

[**Editor's Note:** For notes on the law of the writ of prohibition, refer to Short & Mellor, *Practice of the Crown Office*, 2nd Edn. at p. 252; Bacon's Abr. *"Prohibition"* Vol. vi p. 564; Comyns' Digest, *"Prohibition"* Vol. vii p. 139 and *Hale's History of the Common law*, 6th Edn. p. 45.]

JUDGMENT

George Seah SCJ:

This is an appeal by the appellant, Haji Salleh bin Jafaruddin, against a decision of Chong J refusing him leave to apply for an Order of Prohibition against the respondents, members of the Committee of Privileges of the Dewan Undangan Negeri Sarawak. At the conclusion of the hearing, the Court dismissed the appeal indicating that we would give our reasons at a later date. This I now proceed to do.

The relevant facts are not in dispute. The appellant is at all material times a member of the Dewan Undangan Negeri Sarawak for the constituency of Oya. The respondents are also members of the Dewan. Respondents 2 to 8 constitute the Committee of Privileges of the Dewan. The 1st respondent is the Speaker of the Dewan and by virtue of r. (5)(a) of the Standing O. 69 of the Dewan Undangan Negeri Sarawak is also Chairman of the Committee of Privileges. On 18 May 1985 Datuk Alfred Jabu ak. Numpang, a Deputy Chief Minister and Minister of Housing as well as a member of the Dewan gave a Notice of Motion that the appellant be referred to the Committee of Privileges for alleged breach of privileges in respect of a speech made by the appellant at the sitting of the Dewan on 16 May 1985. The said

Motion was seconded by the 2nd respondent, Dr. Wong Soon Kai whereupon the Dewan resolved that the same be referred to the Committee of Privileges to investigate and to report its finding to the Dewan.

On 23 August 1985 the secretary of the Dewan issued a notice to the appellant requiring him to attend before the Committee of Privileges on 23 September 1985 when the Committee would inquire into the charge of the alleged breach of privileges. By letter dated 6 September 1985 the appellant applied to the 1st respondent in his capacity as Chairman of the Committee that the 2nd, 4th and 7th respondents be disqualified or withdrawn from the Committee of Privileges on the ground of likelihood of bias against him and that he be permitted legal representation at the hearing. On 9 September 1985 the 1st respondent replied that the application of the appellant was not approved. Apprehending an adverse outcome of the enquiry to be held by the Committee of Privileges the appellant applied to the High Court at Kuching for leave to issue an order of prohibition against the respondents directing and restraining them from proceeding with the enquiry scheduled on 23 September 1985. This was refused by the learned Judge. Hence this appeal.

Now, the writ of prohibition has been described as "a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior Court from usurping a jurisdiction with which it was not legally vested", or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction (see Short & Mellor, *Practice of the Crown Office*, 2nd Edn. at p. 252). This definition was cited with approval by Viscount Cave in the case of *Clifford v. O'Sullivan* [1921] 2 AC 570 at 582. This definition according to Viscount Cave is supported by the statements of text-writers (Bacon's Abr. *"Prohibition"*, Vol. vi p. 564; Comyns' Digest, *"Prohibition"*, Vol. vii, p. 139; Hale's History of the Common Law, 6th Edn. p. 45) as well as by the opinion of Milles J in *London Corporation v. Cox* LR 2 HL 239/254 and by that of Lord Blackburn in *Mackonochie v. Lord Penzance* [1880-81] 6 App. Cas. 424/443.

In 1882 in the case of *The Queen v. Local Government Board* [1882- 83] 10 QBD 309 at 321 Brett LJ said:

> I think I am entitled to say this, that my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by **Act of Parliament** ...

Some forty-two years later in *R v. Electricity Commissioners* [1924] 1 KB 171 at 205 Atkin LJ echoed the view of Brett LJ in the much quoted passage which reads:

> Wherever any body of persons **having legal authority** to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs (prohibition and *certiorari*).

In *O'Reilly v. Mackman* [1983] 2 AC 239 at 279 Lord Diplock observed that "For the next 40 years this phrase (of Atkin LJ) gave rise to many attempts, with varying success, to draw subtle distinctions between decisions that were quasi-judicial and those that were administrative only. But the relevance of arguments of this kind was destroyed by the decision of this House in *Ridge v. Baldwin* [1964] AC 40 where again the leading speech was given by Lord Reid". However, Lord Diplock reiterated that "Wherever any person or body of persons has authority **conferred by legislation** to make decisions of the kind I have described,

it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights afforded to him by the rules of natural justice or fairness, *viz* to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made ..." *a* *b*

Having regard to these authorities it may be observed that originally the writ of prohibition was directed to Courts of inferior jurisdiction and the writ was normally used to control lower Courts acting in excess of their jurisdiction or in contravention of law. However, it was later extended by the superior Court to statutory bodies exercising such legal jurisdiction when they were brought into existence by Acts of Parliament. The same principle would apply to any person or a body of persons conferred with such jurisdiction by any enactment passed by a State legislature. However, it is plain that the Committee of Privileges of the Dewan Undangan Negeri Sarawak are not such a body of persons. Members of the Committee of Privileges are nominated by the Dewan Undangan Negeri Sarawak under Standing O. 69(5)(a) at the beginning of each session, and the Speaker shall be Chairman of the Committee of Privileges. It is not disputed that the Standing Orders are enacted under Article 24(1) of the State Constitution of Sarawak. The function of the Committee is to consider all matters which shall be referred to it concerning the privileges and powers of the Dewan and to report the same from time to time to the Dewan. In my opinion, the Committee are an investigating body of the Dewan. That the Committee have no decision-making power is made clear by Standing O. 69(5)(d) which provides that "As soon as any report of the Committee has been laid on the Table and circulated to members, a Minister may give notice of a motion expressing the opinion of the Dewan with regard to the matter of the report, and any such motion shall, on the day for which notice of it is given, have precedence over all public business other than proceedings under Standing O. 65 to 68 inclusive". Students of English constitutional history are well aware of the controversy which attended the establishment of the powers, privileges and immunities of the House of Commons resulting in 1840 by judicial declarations terminating that controversy (see *Stockdale v. Hansard* 112 ER 1112). For over a century or more both Parliament and the Courts in England have been careful not to act so as to cause conflict between them. In my judgment, unless compelled to do so by clear authority and none had been cited by learned Counsel for the appellant, I would not be prepared to enlarge the supervisory jurisdiction of the superior Court by extending the writ or order of prohibition to a Committee of Privileges of the Dewan Undangan Negeri of Sarawak when acting as an investigating body. Anyway, it appears to me that the whole trend of authorities since 1882 is clearly against such extension. *c* *d* *e* *f* *g*

Next, the learned Deputy State Attorney-General relied on Article 72(1) of the Federal Constitution in support of his submission that proceedings before the Committee of Privileges of the Dewan Undangan Negeri Sarawak are not amenable to the jurisdiction of the superior Court. Learned Counsel for the appellant disputed the correctness of his contention. Now, Article 72(1) reads: *h*

> The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any Court.

"Legislative Assembly" has been defined in Article 160(2) to mean the representative assembly, however called, in the legislature of a State (and in particular includes the Council Negeri in Sarawak), but except in the Eighth Schedule includes also a Legislative Council, however called. *i*

Section 21 of the Eighth Schedule to the Federal Constitution provides:

> 21(1)The Legislative Assembly shall consist of:
>
> (a) such number of elected members as the Legislature may by law provide, and
>
> (b) such number of other members, being less than the number of elected members, as the Ruler may appoint; and, until other provision is made as aforesaid, the number of elected members shall be the number specified in Article 71 of the Federal Constitution.
>
> (2) Notwithstanding anything in s. 6 of the Eighth Schedule to the Federal Constitution, a person shall not be disqualified for being an appointed member of the Legislative Assembly by reason only that he holds an office of profit.

In the view I take of this appeal I have not thought it necessary to express any view on these rival submissions except to point out that a distinction appears to have been made by the Federal Constitution between proceedings in the "Legislative Assembly" and in "any of the Committee" of the Dewan Undangan Negeri (see Article 72(2)). I mention it now so that it may not be assumed hereafter that I have by my silence tacitly accepted the submission of the learned Deputy State Attorney-General or the learned Counsel for the appellant.

There was one other matter I like to allude to and that is O. 53 r. 1(3) of the Rules of the High Court 1980. Sub-rule (3) reads:

> The applicant must give notice of the application for leave not later than the preceding day to the Attorney-General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

In his ruling at p. 4 the learned Judge said:

> In my view, an application is made on the date when it is filed in Court, and not when it is heard by the Court as impliedly suggested by learned Counsel for the applicant. In this case the application for leave was filed, and hence made, on 17 September 1985 and since the "necessary documents" were stated to have been served on the Attorney-General's Chambers on 19 September I do not think that the requirement under r. 1(3) had been fulfilled. The application, in my view, was not competent and ought to be struck out.

I am unable to agree with this interpretation. With respect to the learned Judge, he seemed to have misconstrued sub-rule (3). In my opinion, the most important words in the sub-rule are not "when an application for leave is made" but "when the applicant must give notice of the application for leave". And, in my judgment, the applicant can only serve the application on the Attorney-General's Chambers when a date for the hearing of the application has been fixed by the Senior Assistant Registrar after consultation with the trial Judge. So if the application for leave is filed on 1 December 1985 and is fixed for hearing on 5 December 1985 the applicant need only serve the necessary documents on the Attorney-General's Chambers on 4 December 1985 in order to comply with the sub-rule. However, if the application for leave is filed on 1 December 1985 and the hearing is fixed for the next day, then according to the construction I have given to the sub-rule, the necessary documents would have to be served by the applicant on the Attorney-General's Chambers on the day the application was filed. In which event application may be made to the Court to abridge the time under O. 3 r. 5 thereof.

Since I am of the opinion that proceedings of the Committee of Privileges of the Dewan Undangan Negeri Sarawak when acting as an investigating body are not amenable to an order of prohibition I agree with the learned Judge that application for leave under O. 53

r. 1 of the Rules of the High Court 1980 should be refused. For the above reasons the appeal was dismissed. Each party to pay own costs of the appeal. The deposit to be returned to the appellant.

Mohd. Azmi SCJ:

I have had the advantage of considering the judgments of my learned brethren. In this particular case, there can be no dispute that the Committee of privileges of the Sarawak State Legislature is merely acting as an investigating body as opposed to a decision making authority. As such, I would with respect concur with the opinion expressed by Dato' George K.S. Seah that proceedings of the said Committee when acting as an investigating body are not amenable to an order of prohibition, and on that ground alone this appeal has, in my view been properly dismissed with costs. There is accordingly no necessity to consider, particularly without the benefit of full argument, the effect of Article 72(1) of the Federal Constitution in relation to the supervisory jurisdiction of the Superior Court. Should the words "any proceedings" in that Article arise for determination in future, perhaps a panel of more than three Judges of this Court will be required to consider whether the Court's power of prohibition is exercisable in respect of quasi-judicial or even administrative proceedings of the State Legislative Assembly or its Committee, as distinguished from its legislative proceedings, having regard to the doctrine of separation of powers.

Wan Hamzah SCJ:

I have read the judgment in draft of my learned brother Datuk George K.S. Seah SCJ I agree that this appeal should be dismissed. I also agree to his interpretation of r. 1(3) of O. 53 of the Rules of the High Court, and in my judgment there was compliance with that rule.

On the question whether leave to apply for an order of prohibition should be granted, in my opinion Article 72(1) of the Federal Constitution applies in this case and is conclusive. That Article provides-

> The validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any Court.

The Legislative Assembly includes the Dewan Undangan Negeri Sarawak, *vide* Article 160(2) of the Federal Constitution.

The appellant asked for leave to apply for an order to prohibit the respondents as members of the Committee of Privileges of the Dewan Undangan Negeri Sarawak "from investigating or adjudicating upon a charge of an alleged breach of privilege of the Dewan Undangan Negeri Sarawak allegedly committed by the applicant (i.e., the appellant) on 16 May 1985". The alleged breach of privilege was the uttering of certain statements while making a speech at the sitting of the Dewan on that date. The grounds for asking for the leave were stated as follows:

(a) any adjudication by the Committee of Privileges as presently constituted by the respondents, in particular the Second, Fourth and Seventh respondents, will be in excess of jurisdiction in that the respondents have threatened to act and will, unless prohibited by this Honourable Court, act in breach of the rules of natural justice;

(b) the respondents functioning as the Committee of Privileges of the Dewan Undangan Negeri Sarawak are under a duty to act constitutionally and fairly but have threatened to act in contravention of Article 8 of the Federal Constitution and/or in breach of the rules of natural justice;

(c) the Second, Fourth and Seventh respondents are pre-disposed against the applicant so that any proceedings or adjudication by the Committee of Privileges of the Dewan Undangan Negeri Sarawak of which the Second, Fourth and Seventh respondents are members will, in the result, be contrary to law and a nullity;

(d) the respondents having in the purported exercise of their discretion denied the applicant legal representation at the hearing aforesaid, the proceedings or adjudication of the Committee of Privileges will be a nullity by reason of the law and/or the provisions of the Federal Constitution.

It is clear that the above grounds touch on the question of the validity of the proceedings to be taken by the Committee of Privileges. That Committee was a Committee nominated under O. 69(5) of the Standing Orders of the Dewan. Article 24(1) of the Constitution of the State of Sarawak provides:

> Subject to the provisions of this Constitution, the Dewan Undangan Negeri shall regulate its own procedure and may make Standing Orders for that purpose.

It is clear that the Standing Orders have been made for the purpose of regulating the procedure for the proceedings of the Dewan and that the proceedings of the Committee of Privileges form part of the proceedings of the Dewan. Therefore to question the validity of the proceedings of the Committee of Privileges is to question the validity of the proceedings of the Dewan, and to do so in the Court is forbidden under Article 72(1) of the Federal Constitution. It should be understood that I apply that Article in view of the particular facts of this case.

Also found at [1986] 2 CLJ 209